Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1400

COWLES BROADCASTING, INC. and
COWLES COMMUNICATIONS, INC.,

Petitioners,

v.

CENTRAL FLORIDA ENTERPRISES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. MARMET
HAROLD K. MCCOMBS, JR.
MARMET PROFESSIONAL CORPORATION
1822 Jefferson Place, N.W.
Washington, D.C. 20036

WILLIAM T. COLEMAN, JR.
DONALD T. BLISS
DAVID G. BOUTTÉ
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioners.

Washington, D.C. • THIEL PRESS • (202) 638-4521

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. THE COURT OF APPEALS' OPINION IS FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S DECISION IN *FCC v. NCCB* 8

A. The Court of Appeals Wrongfully Refused to Recognize the Importance This Court has Accorded Continuity of Meritorious Service as a Relevant Factor in the "Public Interest" Determination 9

B. The Limitations Placed by the Court of Appeals on the Relevancy of Past Performance Are Directly Contrary to This Court's Determination of Past Performance as "The Most Important Factor" in Renewal Decisions 12

C. By Reordering the Balance Between Diversification of Mass Media Ownership and Meritorious Past Performance, The Court of Appeals Improperly Substituted its Policy Judgment for That of the Commission 15

II. BECAUSE THE COURT OF APPEALS MADE SERIOUS ERRORS OF LAW AND FACT, ITS DECISION IS CLEARLY WRONG 17

III. IN ITS ATTEMPT TO OBFUSCATE THE INCONSISTENCIES, THE COURT OF APPEALS' OPINION LEAVES IN UTTER CONFUSION THE MEANING OF THE "PUBLIC INTEREST" STANDARD, THE COMMISSION'S STATUTORY RESPONSIBILITIES, THE OBLIGATIONS AND RENEWAL EXPECTANCIES OF

Page

ALL INCUMBENT BROADCAST LICENSEES, AND THE APPROPRIATE COURSE OF ACTION FOR PETITIONERS 19

CONCLUSION 20

APPENDIX ..... Separate Volume

TABLE OF AUTHORITIES

Cases:

Alianza Federal de Mercedes v. Federal Communications Commission, 539 F.2d 732 (D.C. Cir. 1976) 12

Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1945) 14

Citizens Communications Center v. FCC, 447 F.2d 1201, *clarified*, 463 F.2d 822 (D.C. Cir. 1972) 12, 14

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 16

Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) ..... *passim*

Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 (1940) 16

Federal Communications Commission v. WOKO, Inc., 329 U.S. 223 (1946) 16

Fidelity Television, Inc. v. Federal Communications Commission, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975) 12

Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 12

Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80 (1943) 16

Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 16

Page

Statutes:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151 (1976) *et seq.*:

Section 301 11

Section 307(d) 3, 4, 11

Section 309(a) 3, 4

Section 402(b)(1) 6

Communications Act of 1934, 48 Stat. 1084 (current version at 47 U.S.C. §307(d) (1976)) 11

Rules:

47 C.F.R. §73.30 (1977) 18

47 C.F.R. §73.212 (1977) 18

47 C.F.R. §73.613(a) (1977) 17, 18

Other Authorities:

H.R. Rep. No. 1750, 82d Cong., 2d Sess. 8 (1952) 11

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 13, 16, 17

S. Rep. No. 44, 82d Cong., 1st Sess. 7 (1951) 11, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

COWLES BROADCASTING, INC. and
COWLES COMMUNICATIONS, INC.,

Petitioners,

v.

CENTRAL FLORIDA ENTERPRISES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Cowles Broadcasting, Inc. and Cowles Communications, Inc., respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 12, 1979.

OPINIONS BELOW

The original opinion of the court of appeals, remanding the Federal Communication Commission's (hereafter "Commission") renewal of a television broadcast license to Petitioners, was rendered on September 25, 1978. The court of appeals amended this opinion by an order filed January 12, 1979. On the same date it issued a separate

order denying petitions for rehearing *en banc* filed by Petitioners and the Commission. It also issued a separate opinion *per curiam*. None of these actions has yet been reported officially.[1]

The Initial Decision of the Administrative Law Judge ("ALJ"), FCC 73D-62 (1973), is neither officially nor unofficially reported. App. at 54a. The Decision of the Commission is reported at 60 F.C.C.2d 372, 37 Rad. Reg. 2d 1487 (1976). App. at 139a. Its Memorandum Opinion and Order denying reconsideration and clarifying the Decision is reported at 62 F.C.C.2d 953, 39 Rad. Reg. 2d 541 (1977). App. at 289a. Its Memorandum Opinion and Order further denying reconsideration, FCC 77-446 (1977), is not officially reported but is found at 40 Rad. Reg. 2d 1627 (1977). App. at 302a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 25, 1978, and amended on January 12, 1979. Petitions for rehearing *en banc* were denied on January 12, 1979, and an opinion *per curiam* issued. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

---

[1]To simplify the array of opinions, the court of appeals' September 25, 1978 opinion as modified by its January 12, 1979 Order shall be cited hereafter as "Opinion". The unamended opinion shall be cited hereafter as "Original Opinion". The order modifying the Original Opinion shall be cited hereafter as "Amendment." The separate January 12, 1979 *per curiam* opinion shall be cited hereafter as "Per Curiam". The Original Opinion is unofficially reported by Pike and Fischer Radio Regulation at 44 Rad. Reg. 2d 345 and by the Bureau of National Affairs Media Law Reporter at 4 Med. L. Rptr. 1503. App. at 1a. The Amendment, Per Curiam opinion and Order denying rehearing are reported at 44 Rad. Reg. 2d 1567. App. at 39a, 44a, and 53a.

QUESTIONS PRESENTED

Whether the decision of the court of appeals rejecting the Commission's balancing of "public interest" benefits in a broadcast license renewal proceeding:

1. Conflicts with the most recent decision of this Court, holding that in a license renewal proceeding (a) the preservation of continuity of meritorious service is an integral part of the statutory "public interest" standard, (b) the past performance of the incumbent is the most important factor in deciding whether to grant license renewal, and (c) in the weighing of policies under the "public interest" standard—a task delegated to the Commission—the continuity of meritorious service outweighs diversification of mass media ownership;

2. Wrongfully concludes that the Commission did not explain adequately its decision and is wrongfully premised on a misreading of the Communications Act of 1934, as amended, the Commission's regulations and policies, and the record; and

3. Leaves in a state of complete confusion the statutory "public interest" standard and the renewal expectancies of incumbent licensees.

STATUTORY PROVISIONS INVOLVED

The Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.*, and, particularly, Sections 307(d)[2] and 309(a)[3] are pertinent in this proceeding.

---

[2]Section 307(d) provides that broadcast licenses can be granted for a three year term and renewed for additional three year terms upon a finding that the "public interest, convenience and necessity would be served thereby." App. at 312a.

[3]Section 309(a) provides that applications, such as renewal applications, may be granted upon a determination that "the public interest, convenience, and necessity will be served." App. at 313a.

STATEMENT OF THE CASE

A broadcast station must renew its license every three years. On October 31, 1969, Cowles Broadcasting, Inc. ("CBI")[4], one of the Petitioners, applied for renewal of its license to operate WESH-TV, Channel 2, Daytona Beach-Orlando, Florida. Central Florida Enterprises, Inc. ("Central"), Respondent, tendered a competing application for a construction permit to establish a new commercial television broadcast station on WESH-TV's Channel 2. Unlike CBI, Central's application did not provide for auxiliary studios in the Orlando area. Because the applications were mutually exclusive, a comparative renewal hearing was required to determine which applicant would best serve the "public interest, convenience, and necessity." 47 U.S.C. §§307(d), 309(a). The court of appeals characterized this proceeding as a "typical comparative renewal case." App. at 2a.

At the hearing, the "standard comparative issue"—as it is applicable to comparative license renewal proceedings—was addressed to determine which of the applicants would provide the "best practicable service" and which would provide the broadest diversification of mass media ownership. CBI's past broadcast record was examined thoroughly. Numerous local residents and community leaders expressed particular satisfaction with CBI's performance, and the record does not contain a single complaint about the station's service. App. at 136a, 231a. The challenger, Central, elected not to introduce evidence concerning its proposed programming. Numerous other subsidiary issues were raised, two of which are relevant

[4] Cowles Florida Broadcasting, Inc. filed the renewal application at issue. During this proceeding it amended its Articles of Incorporation to change its name to Cowles Broadcasting, Inc.

here: (1) the use of dual studios under the Commission's rules and (2) the relevancy, if any, of certain mail fraud allegations made against other completely separate subsidiaries of CBI's parent corporation, Cowles Communications, Inc. ("CCI").[5]

On December 7, 1973, the ALJ granted CBI's renewal application and denied Central's competing application. The ALJ concluded that CBI merited a "distinct preference" under the "best practicable service" criterion based primarily on its past performance, which outweighed Central's advantage because of diversification of mass media ownership.[6]

On July 30, 1976, the Commission affirmed the ALJ's decision, but noted that the ALJ's findings did not adequately reflect the "outstanding" quality of CBI's past performance and community involvement. App. at 228a. Following its own careful examination of the record, the Commission concluded that CBI's past performance deserved a rating of "superior", entitling it to a "plus of major significance." The Commission affirmed the ALJ's conclusion that CBI's pref-

[5] See App. at 57a for the full text of the issues.

[6] Central had no other media interests, and CCI, at that time, was the licensee of a television station and two radio stations in Des Moines, Iowa. The radio stations were subsequently divested. CCI was the parent of the licensee of two radio stations in Memphis, Tennessee, which were also subsequently divested, and it owned stock in The New York Times Company. The ALJ (and later the Commission) found CCI's broadcasting interests of "little decisional significance" because they were remote from the Daytona Beach area and were not even dominant in their own communities, and because CBI had substantial management autonomy. The ownership of The New York Times Company stock was deemed insignificant because CCI did not have a controlling interest.

erence for best practicable service outweighed Central's preference under diversification. It also agreed with the ALJ that neither the "main studio" nor the "mail fraud" issues constituted grounds for denying the license renewal to CBI.[7]

On January 4, 1977, in its supplementary opinion, the Commission clarified its finding that CBI's past performance was "superior", explaining that the level of service provided by WESH-TV was "sound, favorable, and *substantially above* a level of mediocre service which might just minimally warrant renewal." App. at 294a (emphasis added). The Commission expressly avoided the word "superior" out of concern that such a "comparative" term would entitle only a small percentage of television licensees to renewal, thereby denying the legitimate renewal expectancies of the vast majority of meritorious broadcasters. App. at 295a.[8]

Central appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit pursuant to section 402(b)(1) of the Communications Act, 47 U.S.C. §402(b)(1). The court of appeals vacated the Commission's orders on September 25, 1978, and remanded the case, concluding that the Commission erred in according more weight to the finding that CBI would provide the best practicable service based upon its substantial past performance than to the finding that

[7] These issues are discussed *infra* at pp. 17-19.

[8] Citizens Communications Center, National Citizens Committee for Broadcasting and the National Black Media Coalition (*amici* before the court of appeals) then petitioned for reconsideration. The Commission held that they lacked standing, but considered the merits of the petition nonetheless and denied it on June 30, 1977.

Central was entitled to a "preference" because of diversification of mass media ownership.

Both the Petitioners before this Court and the Commission sought rehearing *en banc*, on the grounds that: (1) the appellate court's decision was inconsistent with the decision of this Court in *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (*"FCC v. NCCB"*), and with appellate court precedent on licensing criteria applicable in a license renewal proceeding; (2) the court of appeals, contrary to the intent of Congress, exceeded its scope of review in substituting its policy judgment for the mandated discretionary judgment of the Commission; and (3) the decision to remand to the Commission on certain special issues was premised on a misreading of the record.

The court of appeals denied these petitions on January 12, 1979, in a separate opinion *per curiam*. The appellate court also amended its September 25 Opinion *sua sponte* to acknowledge this Court's holding in *FCC v. NCCB* by including a quote from that opinion and by deleting certain incorrect policy directions and statutory interpretations. App. at 39a, Amendment. As the following discussion will demonstrate, however, the appellate court's decision is still in conflict with *FCC v. NCCB*.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' OPINION IS FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S DECISION IN *FCC v. NCCB.*

This Court has recognized—and recently reaffirmed—that a licensee who has given meritorious service has

> a "legitimate renewal expectanc[y]" that is "implicit in the structure of the Act" and *should not be destroyed absent good cause.*

FCC v. NCCB, 436 U.S. at 805 (emphasis added). This policy is based on this Court's recognition that, in reliance on their legitimate renewal expectancy, incumbent broadcast licensees, including Petitioners, will invest in the technology that brings quality service, experiment with innovative programming, and provide local and informational programs.

The appellate court's belated discovery of this Court's decision—completely ignored in the Original Opinion although brought to its attention—does not change the fundamental inconsistency of its Opinion—even as modified—with this Court's recognition that "existing licensees [are evaluated] on a somewhat different basis from new applicants."[9] *Id.* at 810-11.

Even as modified, the court of appeals' opinion conflicts with *FCC v. NCCB* in three fundamental ways:

[9] The Amendment correctly deleted the erroneous statement in the Original Opinion that a distinction between initial and renewal proceedings would not be "lawful without an amendment to the hearing provisions of the Communications Act" (App. at 21a, 43a), but ignored the substantial legislative history in support of the distinction which was cited by this Court in *FCC v. NCCB*, 436 U.S. at 811 n.31.

(1) it denigrates the public interest benefit in "a policy of avoiding undue disruption of existing service" (*id.* at 782); (2) it undermines the significance of "past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation" (*id.* at 806); and (3) it supplants the Commission's policy discretion by requiring that greater weight be accorded the factor of diversification (*id.* at 810). Furthermore, the Opinion directly contradicts the legislative history of the Communications Act, prior decisional law, and longstanding administrative practice—all of which were cited with approval by this Court.

A. The Court of Appeals Wrongfully Refused to Recognize the Importance This Court has Accorded Continuity of Meritorious Service as a Relevant Factor in the "Public Interest" Determination.

This Court has explained that continuity of meritorious service furthers the "public interest" both by "bringing proven broadcast service to the public" and by "rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance." *Id.* at 805. Initially, the appellate court erroneously characterized the Commission's consideration of continuity of service as an "embarrassingly clear" presumption of renewal. App. at 23a, Original Opinion. Only after Petitioners and the Commission pointed out the blatant inconsistency with *FCC v. NCCB* in requests for rehearing *en banc*, did the appellate court begrudgingly concede:

> This, we admit, appears at least a plausible construction of the "public interest". App. at 49a, Per Curiam.

In finding a congressional policy clearly recognized by this Court to be "plausible", the court of appeals has both glossed over the obvious conflict between its Original Opinion and *FCC v. NCCB*[10] and sidestepped the basic issue of the significance of past performance as a noncomparative criterion, irrespective of its predictive value. In complete disregard of this Court's unambiguous language,[11] the appeals court left as "open and difficult questions" whether "a 'substantial' past record would be a factor weighed in the incumbent's favor . . . [in order] to *promote security* directly and to *induce investment.*" App. at 41a, Amendment (emphasis added).

[10]The Amendment now incorporates a quoted passage from *FCC v. NCCB* in an apparent attempt to remedy this glaring defect (App. at 42a, Amendment), but this reference merely highlights the contradiction as the quoted passage stands isolated, unexplained, and in conflict with the rest of the appellate court's decision. Moreover, although intimating that this Court's construction of "public interest" may be "plausible", the appeals court clearly reserves its judgment by claiming that the Commission did not adequately explain its rationale nor would it be permitted to present such a rationale for the first time to the appellate court. App. at 50a, Per Curiam. In fact, as this Court has recognized, "[T]he Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest." *FCC v. NCCB*, 436 U.S. at 805. Furthermore, in its decision and again on reconsideration, the Commission articulated this rationale by emphasizing "renewal expectancies" and stressing that the license renewal process should not be used to restructure the broadcast industry. App. at 237a, 295a. The Commission also took notice of the ALJ's reliance on the importance of industry stability. App. at 133a, 210a.

[11]"We agree with the Court of Appeals that '[p]rivate losses are a relevant concern under the Communications Act only when shown to have an adverse effect on the provision of broadcasting service to the public.' [Citations omitted.] *Private losses that result in discouragement of investment in quality service have such an effect.*" *FCC v. NCCB*, 436 U.S. at 805-06 n.24 (emphasis added).

A policy which fails to take into full account the actual performance of the licensee and the need to preserve continuity of service is clearly not in the public interest. Investment in quality programming and the freedom to innovate and to take the risks inherent in informational (news and public affairs) and local programming depend on the licensee's stability and the avoidance of unnecessary disruption. The Communications Act does not require that these "public interest" objectives be ignored,[12] and Congress clearly did not intend such a result.[13] Prior appellate court decisions

[12]The appellate court's recitation of statutory provisions that support its bias against an incumbent's expectancy of renewal (*e.g.*, 47 U.S.C. §301 "no . . . license shall be construed to create any right beyond the terms, conditions, and periods of the license" App. at 4, Original Opinion n.4) is directly contradicted by this Court in *FCC v. NCCB:* "The fact that a licensee does not have any *legal* or *proprietary* right to a renewal does *not* mean, however, that the Commission cannot take into account the incumbent's past performance in deciding whether renewal would serve the public interest." *Id.* at 806 n.25 (emphasis added).

[13]Congress expressly amended the Communications Act in 1952 to enable the Commission to apply a different "public interest" standard to renewal applicants. Prior to 1952, §307(d) provided that decisions on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications." *See* Communications Act of 1934, 47 U.S.C. §307(d), 48 Stat. 1084. In 1952 the section was amended to provide simply that renewal "may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby." Communications Act Amendments of 1952, 66 Stat. 714 §5. The House Report explained that the previous language "is neither realistic nor does it reflect the way in which the Commission actually has handled renewal cases," H.R. Rep. No. 1750, 82d Cong., 2d Sess. 8 (1952), and the Senate Report specifically stated that the Commission has the "*right and duty* to consider, in the case of a station which has been operating and is applying for a renewal, the overall performance of

[footnote continued]

consistently have recognized this distinction between initial and renewal proceedings.[14]

B. The Limitations Placed by the Court of Appeals on the Relevancy of Past Performance Are Directly Contrary to This Court's Determination of Past Performance as "The Most Important Factor" in Renewal Decisions.

By limiting the relevance of the incumbent's past performance to mere evidence of the *credibility* of the licensee's renewal *proposals* and by establishing a restrictive test of "superior" performance, the court of appeals has undermined the statutory "public interest" standard as defined by this Court in *FCC v. NCCB*, 436 U.S. at 806, 810. This Court clearly stated:

> [T]he Commission has long considered the past performance of the incumbent as *the most important factor* in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation.

---

that station against the broad standard of public interest, convenience, and necessity." S. Rep. No. 44, 82d Cong., 1st Sess. 7 (1951) (emphasis added). *See FCC v. NCCB*, 436 U.S. at 811 n.31. The court of appeals distorts this legislative history. *See* App. at 3a, Original Opinion, n.4.

[14] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("legitimate renewal expectancies [are] implicit in the structure of the Act"); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213, *clarified*, 463 F.2d 822 (D.C. Cir. 1972) ("incumbent licensees should be judged primarily on their record of past performance"); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 702 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975) ("when faced with a fairly and evenly balanced record, the Commission may, on the basis of the renewal applicant's past performance, award him the license."); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 & n.9 (D.C. Cir. 1976).

436 U.S. 806 (emphasis added). Yet the court of appeals berated the Commission for judging "incumbents largely on the basis of their broadcast record, to which there will be nothing comparable on the side of a challenger in any case" (App. at 31a, Original Opinion (footnote omitted)) and for the "wholly *noncomparative* assessment of Cowles' past performance." App. at 20a, Original Opinion (emphasis added).

The appellate court's reliance on the comparative criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereafter *"1965 Policy Statement"*) to guide the balancing and outcome of the renewal proceeding is misplaced and contrary to the critical distinction between initial and renewal licensing implicit in the structure of the Communications Act. App. at 20a-23a, 28a, 34a, 40a, Opinion.[15] According "equal footing" in a *renewal* proceeding to the criteria in the *1965 Policy Statement*—which were adopted to govern *initial* licensing proceedings—is also directly contrary to the holding in *FCC v. NCCB*. The *1965 Policy Statement* is necessarily concerned with structure and proposals, not with performance and continuity, and if applicable, would not protect the renewal expectancies of broadcasters who have rendered meritorious service. Challengers can, and will, easily structure themselves to appear superior to the renewal applicant on these initial licensing criteria, especially in organizational matters and

---

[15] Footnote 1 to the *1965 Policy Statement* provides:

> This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.

1 F.C.C.2d at 393.

promises of performance. The renewal applicant lacks such structural flexibility. Its full hearing rights, guaranteed by this Court,[16] can only be preserved by due consideration and emphasis on its past broadcast record.

The court of appeals attempted to limit further the Commission's consideration of past performance by providing that only "superior" performance is "highly relevant to the *comparison*, and might be expected to prevail absent some clear and strong showing by the challenger under the comparative factor." App. at 37a (emphasis added). First, the Commission and not the courts is charged with the responsibility for establishing renewal standards.[17] More importantly, as the Commission's supplementary decision sought to explain, rigid adherence to a notion of "superior" performance would mean that only a small percentage of all broadcasters would be entitled to renewal despite clearly demonstrated "meritorious" programming. The "superior" test is inherently contrary to the principle that broadcasters have legitimate renewal expectancies

[16] *See generally Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[17] In *Citizens Communications Center v. FCC*, 463 F.2d 822 (D.C. Cir. 1972), the court of appeals noted that "superior" performance would be entitled to a "plus of major significance." The court of appeals now attempts to transform and elevate this dictum to a threshold of relevance which would require that the Commission demonstrate "superior" performance in order to justify the renewal on the basis of the incumbent's record. The illustrative criteria set forth in *Citizens Communications Center, id.* at 823, apparently now have become legal prerequisites, requiring conformance by incumbent licensees. App. at 36, Original Opinion, n.93.

under the Communications Act, and works to defeat the public interest in continuity and stability. *FCC v. NCCB*, 436 U.S. at 805.

C. By Reordering the Balance Between Diversification of Mass Media Ownership and Meritorious Past Performance, The Court of Appeals Improperly Substituted its Policy Judgment for That of the Commission.

The court of appeals' holding that "it was unreasonable then to accord the diversification finding 'little decisional significance,' " (App. at 30a, Original Opinion) was not in keeping with this Court's conclusion that "diversification of ownership [is] a factor of less significance" than past performance. *FCC v. NCCB*, 436 U.S. at 810. Moreover, by rejecting the weight the Commission gave to diversification of ownership, the appellate court has usurped the weighing task that Congress has delegated to the Commission. *Id.* The weight the Commission accorded diversification was fully consistent with this Court's most recent articulation of this issue:

> Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission's general practice has been to go with the "proven product" and grant renewal if the incumbent has rendered meritorious service.[18]

[18] 436 U.S. at 806. In an attempt to avoid this obvious inconsistency, the court of appeals said in its Amendment that it objected only to the "*manner* in which the Commission analyzed the concededly relevant factor, not intending to prescribe the *weight* which the Commission generally should accord media concentration in the context of comparative renewal hearings." App. at 43a (emphasis added). Nonetheless, the court of appeals concluded that the Commission's reconstruction of the diversification criteria

[footnote continued]

By rebalancing the scales and assigning a higher value to the media diversification factor, the appellate court has intruded impermissibly into the administrative decision-making process. Such intrusion is improper in any circumstance, but it is especially so here where the appellate court has directed a result which is squarely at odds with the established law. Its attempt to substitute its policy judgment for that of the Commission conflicts in principle with this Court's clear command that the courts adopt a deferential standard of judicial review. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). "The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Furthermore, "it is the Commission, not the courts, which must be satisfied that the public interest will be served." *FCC v. WOKO, Inc.*, 329 U.S. 223, 225 (1946).

"belittl[ed]" Central's advantage (App. at 26a, Original Opinion), that the Commission "*seriously undercut* the utility of the diversification criteria" (App. at 28a, Original Opinion (emphasis added)), and that the *1965 Policy Statement* established that "related media interests anywhere in the nation are quite material" (*id.* (emphasis added)). Each of these objections goes to the weight accorded diversification and is inconsistent with this Court's holding that "diversification of ownership [is] a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing." *FCC v. NCCB*, 436 U.S. at 810.

II.

BECAUSE THE COURT OF APPEALS MADE SERIOUS ERRORS OF LAW AND FACT, ITS DECISION IS CLEARLY WRONG.

The appellate court's decision is plainly wrong on several counts: It wrongly contended that the Commission did not adequately explain its findings and rationale; it misconstrued the statute, legislative intent and the Commission's regulations; and it misread the record.

(1) Shifting the emphasis to sidestep the obvious conflict of its Original Opinion with *FCC v. NCCB*, the court of appeals redirected its attack on the Commission's "wholly unintelligible" balancing of its findings and "administrative feel." In fact, the ALJ and the Commission explained fully the findings and how they were reconciled and weighed and then, on reconsideration, the Commission explained further its rationale. The appellate court may disagree with the Commission's rationale, but it cannot pretend that it was not set forth expressly by the Commission. App. at 207a-238a; 294a-299a; 307a-309a.

(2) The appellate court ignored the statutory distinction between initial and comparative hearings, misinterpreted the 1952 amendment and its legislative history (*supra* note 13), and repeatedly misapplied the Commission's *1965 Policy Statement*.

It further misread the Commission's rule on television "main studios," 47 CFR §73.613(a).[19] The court of appeals found a "plain violation" of the rule—a conclusion which far exceeded that drawn by the Com-

[19] Section 73.613 provides, in part: "Main studio location. -- (a) The main studio of a television broadcast station shall be located in the principal community to be served . . . ."

mission—and directed the Commission to reconsider this matter.[20] In so doing, the appellate court mistakenly confused the clear and specific main studio rules for radio stations, 47 CFR §§73.30, 73.210,[21] with the ambiguous and undefined main studio rule for television stations, 47 CFR §73.613(a). The court of appeals also contradicted its own statement that "the choice of remedies and sanctions for violations of Commission rules 'is a matter wherein the Commission has broad discretion.' " App. at 24a, Original Opinion. In its detailed review of the issue, the Commission considered the ambiguity of the television main studio rule during the license period; the lack of interpretive precedent; the absence of requirements for maintaining records of program origination; the lack of any complaints about the station's operation; and the meritorious service to the city of license, Daytona Beach.

(3) Furthermore, the court of appeals misread the record concerning Central's allegations about "common officers" and the curtailment of the inquiry in the so-called mail fraud issue, erroneously concluding that the Commission failed to fully address these points. In fact, however, as Petitioners pointed out in their Petition for Rehearing, the Commission thoroughly addressed this issue and resolved it in favor of Petitioners. While Central failed to perfect the issue of common officers, raising it for the first time on appeal, Petitioners nonetheless pointed out that the ALJ had in fact reviewed the evidence and made findings on this point. They also pointed out the confused state of Central's pleadings, its failure to articulate any harm and its failure to seek administrative and judicial review of the ALJ's decisions.

[20] When CBI acquired WESH-TV in 1966 the station already had its main studio in Holly Hill, just outside Daytona Beach, and an auxiliary studio in Winter Park, just outside Orlando. Neither studio was closed by CBI, nor was there a physical "move" of either studio. Rather, the issue concerned the use of each studio. The Commission did not accord significance to this issue.

[21] These rules provide that the main studios for AM and FM stations should be located in the city of license and that a majority of a radio station's programs, or two-thirds of its non-network programs, must originate from the main studio.

III.

IN ITS ATTEMPT TO OBFUSCATE THE INCONSISTENCIES, THE COURT OF APPEALS' OPINION LEAVES IN UTTER CONFUSION THE MEANING OF THE "PUBLIC INTEREST" STANDARD, THE COMMISSION'S STATUTORY RESPONSIBILITIES, THE OBLIGATIONS AND RENEWAL EXPECTANCIES OF ALL INCUMBENT BROADCAST LICENSEES, AND THE APPROPRIATE COURSE OF ACTION FOR PETITIONERS.

The court of appeals has characterized this proceeding as "a typical comparative renewal case" and has boldly asserted that "the state of administrative practice in Commission comparative renewal proceedings is unsatisfactory." App. at 2a-3a, Original Opinion. With its Original Opinion and its ambiguous, confusing and internally contradictory Amendment, the court of appeals has created a state of utter confusion. Incumbents do not know whether they have legitimate renewal expectancies and, if so, what such expectancies encompass. They do not know how the past broadcast record and diversification of ownership will be weighed or whether avoidance of disruption and continuity of service are relevant factors. This climate of confusion is hardly conducive to inyestment in meritorious service.

In the semantical wake of the court of appeal's decision, with the simultaneous use of the words "meritorious" and "superior" and the constantly changing

characterization of the WESH-TV broadcast record, Petitioners do not know what evidence should be adduced on remand or by what standards CBI's renewal application will be judged.

CONCLUSION

Thus, after nine years of administrative and judicial process, including three decisions of the Commission awarding a license renewal to CBI, Petitioners are now faced with the prospect of further hearings without any clear ground rules. This situation is unsettling, not only to Petitioners, but also to every broadcaster which must file for renewal of its license. For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted for the purpose of clarifying the law and providing guidance to licensees.

Respectfully submitted,

ROBERT A. MARMET
HAROLD K. MCCOMBS, JR.
MARMET PROFESSIONAL CORPORATION
1822 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 331-7300

WILLIAM T. COLEMAN, JR.
DONALD T. BLISS
DAVID G. BOUTTÉ
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5300

Counsel for Petitioners,
Cowles Broadcasting, Inc.
and
Cowles Communications, Inc.

March 13, 1979